

September 3, 2015

Via Electronic Filing

The Honorable Paul A. Engelmayer
United States District Court
Southern District of New York
40 Centre Street, Room 2104
New York, New York 10007
EngelmayerNYSDChambers@nysd.uscourts.gov

Re: *Permission Data, LLC v. Newsmax Media, Inc.*
Case No.: 1:14-cv-07129-PAE

Dear Judge Engelmayer:

We are legal counsel for the defendant/counter-plaintiff, Newsmax Media, Inc. (“Newsmax”), and are joined in this letter by Richard Newman, Esq., counsel for third-party, The Way Holdings, LLC *a/k/a* CPA Way (“The Way”). The intention of this letter is to secure Your Honor’s approval of the parties’ agreement to afford The Way an enlargement of time to respond to Newsmax’s August 19, 2015 Subpoena *Duces Tecum* (“Subpoena”) without impacting Newsmax’s rights under the upcoming September 7, 2015 discovery deadline¹ – including Newsmax’s right to later seek judicial intervention should it ultimately prove necessary.²

A brief summary is needed to provide context for the Subpoena. Newsmax engaged the plaintiff/counter-defendant, Permission Data, to run online marketing surveys with the hope of expanding its email database with new, authentic, non-computer generated opt-in email addresses. [See Newsmax’s Counterclaim, D.E. 7 at ¶¶ 1, 12-13, 26-28]. Permission Data purports to assist advertisers, such as Newsmax, by serving as an online advertising network or “ad network,” placing its client’s online advertisements and associated campaigns on select third-party websites, whose sites are “brand safe” and germane to the advertiser’s message. In simple terms, Permission Data was to serve an online matchmaker, interconnecting Newsmax with publishers (*i.e.*, websites that were to host Newsmax’s online campaigns) and prospective consumers. (*Id.* at ¶ 13).

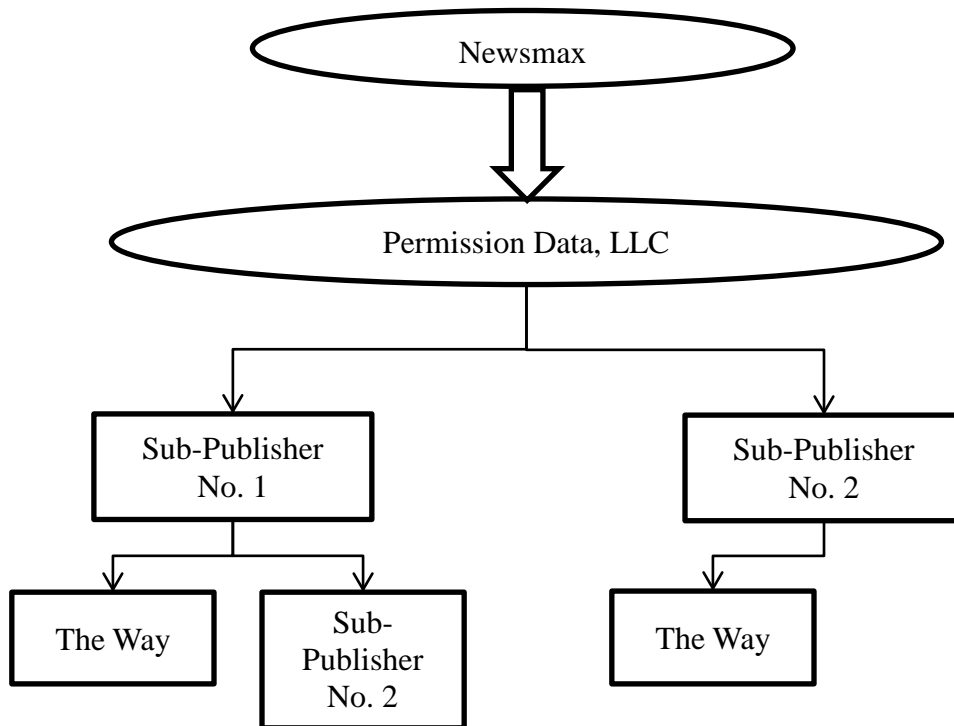
In rendering its services, Permission Data utilized not just third-party websites, but also third-party ad networks, or sub-publishers (a minimum of thirteen), who themselves would place

¹ September 7, 2015 is a legal holiday.

² While the plaintiff/counter-defendant, Permission Data LLC (“Permission Data”) disputes the relevancy of the subpoenaed documents, it does *not* oppose the requested relief. To the contrary, the requested relief is consistent with the relief requested in the September 2, 2015 letter jointly filed by Permission Data and Newsmax in which the parties collectively request a *limited* three (3) week extension of the existing fact discovery deadline. [D.E. 43].

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Newsmax's online advertisements in an attempt to new email addresses.³ Consequently, the dynamics were as follows:



Newsmax's first learned of The Way's involvement in its campaigns during the August 5, 2015 deposition of Sub-Publisher No. 1's Fed. R. Civ. P. 30(b)(6) corporate representative,⁴ in which Sub-Publisher's corporate representative testified that The Way provided around "55,000 leads" of the total 213,146 email addresses attributed by Permission Data to Sub-Publisher No. 1.⁵ Thereafter, on August 18, 2015, the Fed. R. Civ. P. 30(b)(6) corporate representative of Sub-Publisher No. 2 – which also neglected to produce responsive documents to Newsmax's December 14, 2014 Subpoena to Produce Documents, Information or Objects, which would have revealed The Way's involvement in Newsmax's campaigns – testified that The Way generated

³ Further complicating the analysis is that several of Permission Data's sub-publishers would themselves serve as "sub-sub-publishers" to the sub-publishers, such as Sub-Publisher No. 2 not only generated leads directly for Permission Data, but also for Sub-Publisher No. 1.

⁴ In deference to Permission Data's claim that the identity of its sub-publishers is propriety, Newsmax has agreed – on a no-waiver basis – to identify the sub-publishers at issue solely as "Sub-Publisher No. 1" and "Sub-Publisher No. 2," as the names of the sub-publishers are not critical to this particular request.

⁵ Documents pertaining to The Way's provision of email addresses to Sub-Publisher No. 1 were responsive to, and should have been produced by Sub-Publisher No. 1, in connection with Newsmax's March 9, 2014 subpoena to Sub-Publisher No. 1. In that Newsmax has sent multiple good faith meet and conferral letters to both Sub-Publishers No. 1 and 2 starting as early as April of 2015, it is of the view that it should not be penalized for the Sub-Publisher's lack of diligence / compliance.

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approximately 100,000 to 120,000 of the total email addresses delivered by Sub-Publisher No. 2 to Permission Data (who, in turn, delivered the email addresses to Newsmax).⁶

On the following day, August 19, 2015, Newsmax effectuated service of the Subpoena on The Way. The Subpoena consists of eighteen (18) requests. Since August 21, 2015, the parties have worked collaboratively in an effort to resolve this matter. These efforts have resulted in a narrowing of the Subpoena and a tentative resolution as to scope and type of documents which The Way will produce. At present, there is no dispute. The only issue is timing, as The Way has indicated it needs additional time, which Newsmax has no objection to providing but for the existing discovery deadline.

Consequently, the parties' jointly request that: (1) The Way be afforded until Friday, September 18, 2015 in which to produce documents responsive to Newsmax's Subpoena correspondence, and (2) that Newsmax be granted until Friday, September 25, 2015 should it deem a pre-motion letter to compel necessary. For all of the foregoing reasons, Newsmax and The Way jointly request that this Court grant the proposed extension.

We thank the Court for its attention to this letter, welcome the opportunity to further explain the need for the requested enlargement, and await direction as to whether the Court desires a proposed agreed order for its consideration.

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⁶ From Newsmax's perspective, the origins and lineage of the email addresses are of questionable relevance as they shed light on, *inter alia*, the authenticity of the email addresses; the conspicuous patterns contained in the email addresses supplied by Permission Data; the manner in which defective email addresses eluded the fraud management platforms purportedly utilized by each tier of sub-publisher, and each sub-publishers purported vetting of the email addresses. It bears noting that Newsmax is *not* presently accusing of The Way of any wrong-doing.